

**REMARKS**

Claims 1-39 are pending.

Applicant's acknowledge and thank the Examiner for the recognition that the previously filed declaration under 37 CFR 1.132 overcomes the previous rejection based upon the archived web-pages. [08/05/08 Office Action, p. 3].

**I. The Examiner's statement re: Applicant's declaration under 37 CFR 1.131 and rejection of claims 1-39 under 35 USC § 103(a).**

The Examiner stated that Applicant's declaration, filed on 03/03/2008 under 37 CFR 1.131, was ineffective to overcome the Butler (US Publication 2004/0261796) reference. The Examiner further stated that "the evidence submitted is insufficient to establish diligence from a date prior to the date of reduction to practice of the Butler reference to either a constructive reduction to practice or an actual reduction to practice. No evidence of diligence has been submitted." [08/05/2008 Office Action, pp. 2-3]. The Examiner then again rejected claims 1, 6-10, and 15-39 under 35 USC §103(a) based on documents from Applicant's IDS's filed 12/10/2003, 04/08/2006, and Applicant's remarks from the response filed 3/03/2008 ("Documents and Remarks") in view of Butler and claims 2-5, and 11-14 under 35 USC §103(a) based on AAPA in view of Butler and Galerne. [08/05/2008 Office Action, p. 11].

Applicant respectfully disagrees and traverses the Examiner's rejection. In an effort to further prosecution and to respond to the Examiner's rejections, Applicant submits herewith a second declaration under 37 CFR 1.131 and a document containing a summary of the on-going development and planned modifications/additions for the CVAC device dated May 30, 2003 ("CVAC Innovations Planned, May 30, 2003"). This document summarizes, *inter alia*, novel features for the CVAC device including interactive control panels and non-invasive covert user sensing systems for auto-compensating programs, and evidences at least conception of an embodiment of the claimed invention at least as early as May 30, 2003.

Also submitted with the declaration are metadata analysis files from three exemplary drafts of the application exchanged between the Applicant and the patent attorney who drafted the application during the drafting of the application. The metadata analysis files show that the exchanged exemplary draft documents of the present application were created on July 8, 2003, July 17, 2003, and July 24, 2003.

The dates of these application drafts, as identified and established by the metadata analysis files, are examples of the on-going diligence in drafting of the present application leading up to the reduction to practice as of the September 11, 2003 filing date.

Applicant asserts that these documents and Applicant's previously filed declaration, in conjunction with the filing of the finalized application on September 11, 2003, establish proof of conception and diligence for the device as described and claimed in the currently pending application at least as early as May 30, 2003.

In light of the additional declaration and documents submitted herewith and the previously submitted declaration under 37 CFR 1.131, Applicant asserts that the presently claimed invention was conceived of prior to the June 30, 2003 filing date of the Butler reference and diligently reduced to practice. Thus, the Butler reference is not available as prior art to the present application, and Applicant respectfully requests withdrawal of the rejections of claims 1-39 that are based on the Butler reference.

**II. Rejection of claims 1-39 under 35 USC §102 and the request for information under 37 CFR 1.105.**

The Examiner has rejected claims 1-39 under 35 USC §102(b) based upon the alleged public use or sale of the invention evidenced by the Documents and Remarks. [08/05/2008 Office Action, p. 3]. Additionally, the Examiner has requested more information under 37 CFR 1.105 regarding "the features included with the invention/model of the CVAC system in public use as of one year prior to the filing date of the present invention (09/10/2002)" in order to "properly consider patentability of the claimed invention under 35 USC 102(b)." [08/05/2008 Office Action, p. 15].

The Examiner has acknowledged that Applicant's representative has "remarked on specific features of the CVAC system in use" prior to 2002, yet requests "full disclosure" of the features included with the invention /model of the CVAC system in public use as of one year prior to the filing date of the present invention (09/10/2002)." Applicant understands the prior statement made by Applicant to fulfill the Examiner's current request, and it is unclear to Applicant how the Examiner's current request differs from the previous request. As stated in the previous response, the device in use more than one year prior to the filing of the present application did not include, *inter alia*, a user sensor as now disclosed and claimed in the present application.

In further support of Applicant's previous statement, and in fulfillment of the Examiner's request for more information under 37 CFR 1.105, Applicant submits herewith a second declaration under 37 CFR 1.132 and a summary document of the features and construction of the device in public use more than one year prior to the filing of the present application. The document, entitled "CVAC Fitness Systems, Inc. Project Profile, January 25, 2001," is dated January 25, 2001 and, although an internal and confidential document of the inventor, describes the features of a "Fitness Excelerator" device in public use prior to September 11, 2002. The composition of the device is described on the second page under the heading "The Fitness Excelerator" which was the name of the device in use at that time. The document does not identify a user sensor as part of the device in public use more than one year prior to the filing of the present application, and the device in public use at that time did not include, *inter alia*, a user sensor.

Because the CVAC system in public use more than one year prior to the filing date of the present application is not the device of pending claims, as evidenced by the aforementioned document, Applicant submits that the alleged prior use of the invention as argued by the examiner does not anticipate the presently claimed invention. Applicant therefore respectfully requests withdrawal of the rejection.

**CONCLUSION**

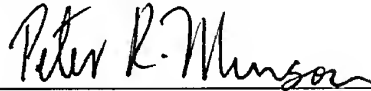
Applicant respectfully submits that the claims are in condition for allowance.

Applicant believes this amendment is timely filed within 5 months of the mailing date of the action and submits herewith a request for 2 months extension of time and associated fees. However, if the Office determines that any other fee is due, please charge Deposit Account No. 23-2415, referencing docket no. 32724-703.201.

If the Office believes, for any reason, that personal communication will expedite prosecution of this application, the Office is invited to telephone the undersigned at (858) 350-2300.

Respectfully submitted,

WILSON SONSINI GOODRICH & ROSATI  
Professional Corporation



Peter Munson  
Attorney for Applicants  
Registration No. 43,821

Date: December 30, 2008

650 Page Mill Road  
Palo Alto, CA 94304  
(650) 493-9300  
Customer No. 021971